(1)

83-1903

NO. _____

IN THE SUPREME COURT
OF THE UNITED STATES OF AMERICA
OCTOBER, 1983 TERM

MORRIS MECHANICAL ENTERPRISES, INC.,

Petitioner,

v.

THE UNITED STATES,

Respondent.

ON APPEAL FROM THE UNITED STATES
COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

PETITION FOR CERTIORARI

H. Robert Ronick
Counsel for Petitioner
470 East Paces Ferry Road
Suite 2000
Atlanta, Georgia 30363
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104 pp

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OF THE UNITED STATES OF AMERICA

MORRIS MECHANICAL ENTERPRISES, INC.,)
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Petitioner,)
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v.) NO. _____
)
THE UNITED STATES,)
)
Respondent.

PETITION FOR CERTIORARI

COMES NOW Morris Mechanical Enterprises, Inc., Petitioner herein, by its counsel, and, pursuant to Rules 17 and 21, files this, its Petition for Certiorari, showing this Honorable Court the following:

(a) The Question Presented for Review: Whether, in an application for payment of attorney's fees and expenses under the Equal Access to Justice Act, 28 U.S.C. Section 2412, et seq., Public Law 96-481, 94 Stat. 2325 (the "Act"), by a party prevailing against the United States in an action to recover

improperly withheld liquidated damages, the term "position of the United States", as used in the Act, means the underlying position or conduct of the governmental agency which gave rise to the litigation, or means merely the litigating position and conduct of the Department of Justice in defending the claim.

(b) List of Parties to the Proceeding: All parties to the proceeding in the Court of Appeals for the Federal Circuit ("CAFC") are named in the caption of this Petition for Certiorari.

(c) Table of Contents and Table of Authorities.

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(d) Opinions Delivered in Courts Below Are as Follows:

(e) Grounds on Which the Jurisdiction of This Court is Invoked Are the Following:

(i) Judgment of the Court of Appeals for the Federal Circuit entered February 24, 1984 (Petition for Rehearing In Banc denied March 23, 1984);

(ii) 28 U.S.C. Section 1254 provides, in pertinent part, as follows: "Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods: (1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree . . ."

(f) The Statute Which this Case Involves: This case involves an application for attorney's fees and expenses under the Equal Access to Justice Act. The Act is set forth in the Appendix attached hereto.

(g) Statement of the Case: Petitioner is a corporation organized, existing, and doing

business under and by virtue of the laws of the State of Georgia.

On March 29, 1978, Petitioner, a small business organization, was awarded a contract by the General Services Administration ("GSA") to deliver, and provide start-up services for, a Centrifugal Liquid Chiller Package for the Federal Law Enforcement Training Center at Brunswick, Georgia. The contract called for Petitioner to deliver the chiller on or before August 18, 1978. Through no fault of Petitioner's, however, the chiller was not delivered to the job site until April 7, 1979, some 231 days late, and GSA assessed liquidated damages of $23,100.00 ($100.00 per day penalty) against the Petitioner.

Because of GSA's failure and refusal to refund the damages, Petitioner filed suit against the government in the United States Court of Claims. After the trial of Petitioner's lawsuit, the Claims Court (name

changed after implementation of the Federal Courts Improvements Act) held, on November 17, 1982, that Petitioner was entitled to recover the liquidated damages, with interest, from GSA.

On December 2, 1982, Petitioner, a "prevailing party" under the terms of the Equal Access to Justice Act, filed its Application for Payment of Attorney fees and Expenses under the Act. In its Application, Petitioner sought to recover approximately $23,000.00 in attorney's fees and expenses; a sum that very nearly matched the principal amount recovered by Petitioner as a result of the Claims Court's decision.

On March 3, 1983, the Claims Court denied Petitioner's Application on the grounds that the government's "position" in litigating the case was substantially justified as contemplated by the Act. Petitioner then filed a timely appeal with the Court of Appeals for the

Federal Circuit. Oral argument was heard by CAFC on October 3, 1983, and, on February 24, 1984, CAFC issued its decision affirming the Claims Court's denial. CAFC subsequently, on March 23, 1984, denied Petitioner's request for an in banc rehearing.

(h) Not Applicable to This Petition.

(i) Basis for Federal Jurisdiction: Dispute between Petitioner and federal agency, GSA, over requirements and performance of federal contract to provide materials and services to federal installation. After prevailing on the merits, Petitioner sought to recover its attorney's fees and expenses pursuant to a federal statute, the Equal Access to Justice Act. Petitioner now seeks review of the meaning of an essential part of that federal statute.

(j) Reasons Relied on For Allowance of the Writ: Rule 17 provides, in pertinent part, that this Court will consider granting

certiorari when a federal court of appeals has rendered a decision in conflict with the decision of another federal court of appeals on the same matter.

Petitioner believes that such a situation exists in the instant case.

CAFC has ruled in the Broad Avenue Laundry and Tailoring v. United States (693 F.2d 1387), Bailey v. United States (721 F.2d 357), and Morris Mechanical Enterprises, Inc. v. United States, (_____ F.2d _____, 1984) cases, that the meaning of the term, "position of the United States", as used in the Equal Access to Justice Act, means only the litigating position adopted by the Department of Justice in defending a government agency in litigation. No thought or importance is given by CAFC to the "position" (and behavior) of the governmental agency which caused a private plaintiff to litigate. In short, CAFC has ruled consistently that no matter how egregious

an agency's actions may be, the only thing that matters is whether the agency's lawyer, the Department of Justice, acts properly in defending the agency. This line of reasoning is at odds with the Third Circuit's holding in Natural Resources Defense Council, Inc. v. U.S. Environmental Protection Agency, (703 F.2d 700), and several district court decisions[1], where it was decided that "position" means and includes the acts, practices, and decisions of the governmental agency which gave rise to the litigation.

Moreover, the CAFC rulings in Broad Avenue, Bailey, and Morris Mechanical are contrary to the congressional intent behind the

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[1]Moholland v. Schweiker, 546 F. Supp. 383 (D.N.H. 1982); Nunes-Correia v. Haig, 543 F. Supp. 812 (D.D.C. 1982); Wolverton v. Schweiker, 533 F. Supp. 420 (D. Idaho 1982); Photo Data, Inc. v. Danforth Sawyer, 533 F. Supp. 348 (D.D.C. 1982); Gava v. United States, No. 817-78, slip op. (Ct. Claims Tr. Div., 1982).

Equal Access to Justice Act. That intent, as demonstrated by the following quotes from the Legislative History of the Act, show clearly that Congress intended for the Act to reach improper acts at the agency, not litigation, level.

In introducing the Act, its sponsors made clear that the purpose of the statute was twofold. "First, it redresses an injustice to the victim which was caused by the government itself. Second, it will have a chilling effect on presently unrestrained regulators who have a tendency to be careless, insensitive, arbitrary, or irresponsible" (125 Cong. Rec. Senate 10922).

This concern was stated again in the Senate Report on the Act, where the following language appears:

> Providing an award of fees to a prevailing party represents one way to improve citizen access to courts and administrative proceedings. When there is an opportunity to recover costs, a party

> does not have to choose between acquiescing to an unreasonable Government order or prevailing to his financial detriment. Thus, by allowing an award of reasonable fees and expenses against the Government when its action is not substantially justified, S. 265 provides individuals an effective legal or administrative remedy where none now exists. By allowing a decision to contest Government action to be based on the merits of the case rather than the cost of litigating, S. 265 helps assure that administrative decisions reflect informed deliberation (Senate Report No. 265, 96th Cong., p. 7).

Moreover, during the floor discussion of the Act, several Senators voiced their reasons for encouraging passage of the Act. For example, Senator Dole observed as follows:

> There are vast resources that enforce the arbitrary decisions of autocratic bureaucrats, but there are very few individuals or small businesses that can afford to fight back. As these rules and regulations continue to multiply, Americans show more and more reluctance to contest regulations because of the astonishing cost of litigation. This bill seeks to create an atmosphere in which citizens are not intimidated by litigation cost. The enactment of this legislation will make it financially possible for the citizens of our Nation to question the governmental decisions. If bureaucrats knew more of their actions would be subjected to questions in court, I believe the tendency

of many bureaucrats to be careless, arbitrary, and irresponsible would cease (125 Cong. Rec. Senate 10915).

And Senator Nelson stated: "In cases such as this, if the individual or business prevails over the Government, and the Government's action is wrong, there is no reason why the Government should not have to pay the attorney's fees and court costs of those who were injured" (125 Cong. Rec. Senate 10922).

Senator De Concini explained:

> Through the device of fee-shifting, the bill attempts to overcome the financial obstacles which prevent citizens from challenging the unreasonable exercise of Government authority. It is also intended to affirmatively encourage citizens to challenge actions which they believe to be unreasonable or irresponsible. It recognizes that those who choose to litigate an issue against the Government are not only representing their own vested interests they are also refining public policy, correcting errors on the part of the Government, and helping to define the limits of Federal authority. In short, people are serving public policy and public purpose (125 Cong. Rec. Senate 10914).

And Senator Domenici said:

> This legislation would mark the beginning of a new stage. It would mark the

> readjustment of the tension which exists between the citizen and the Federal agencies which govern their lives. The pendulum has swung too far to the side of the bureaucracy. The basic problem to overcome is the inability of many Americans to combat the vast resources of the Government in administrative adjudication. Today, the average American must be made to feel that he can question the exercise of the Government's discretionary power as to its reasonableness--without incurring large costs if he prevails. Providing for award of legal fees to prevailing private litigants, except where the governmental action was substantially justified, will not deter the Goverment from pursuing meritorious governmental action. The purpose is to readjust the position between the Government acting in its regulatory capacity and individual rights. It is to insure against capricious and arbitrary federal regulation (125 Cong. Rec. Senate 10916).

Senator McClure, in summarizing his reasons for supporting the Act, noted: "As it now stands, Federal bureaucracies have, in effect, the power to money whip too many individuals, firms, and municipalities into submission, even where those agencies are in the wrong. The balance can be redressed to a degree if a person knows that if he is proven

right, he will be reimbursed the full cost of litigation" (125 Cong. Rec. Senate 10921).

Another statement of Congress' intentions in passing the Act is contained in the Report of the House Committee on the Judiciary, where the Committee adopted the Senate Report on S. 265 (quoted, in pertinent part, earlier in this Petition), and added the following language:

> ...In so doing, fee-shifting becomes an instrument for curbing excessive regulation and the unreasonable exercise of Government authority. In this context, the committee believes that S. 265 serves the public interest and justifies an exception to the American rule that each party must bear his own costs in litigation...
> (Report of the House Committee on the Judiciary, No. 96-1418, September 26, 1980, pp. 12-13).

Congress also considered, and reacted to, the very same type of factual situation which gave rise to Appellant's lawsuit, when Congress said the following:

> For many citizens, the cost of securing vindication of their rights and the inability to recover attorney fees precludes resort to the adjudicatory process. When the cost of contesting a

> Government order, for example, exceeds the amount at stake, a party has no realistic choice and no effective remedy. In these cases, it is more practical to endure an injustice than to contest it... Thus, at the present time, the Government with its greater resources and expertise can in effect coerce compliance with its position. Where compliance is coerced, precedent may be established on the basis of an uncontested order rather than the thoughtful presentation and consideration of opposing views. In fact, there is evidence that small businesses are the target of agency action precisely because they do not have the resources to fully litigate the issue. This kind of truncated justice undermines the integrity of the decision making process. (Report of the House Committee on the Judiciary, No. 96-1418, September 26, 1980, pp. 9-10).

Finally, in its Statement of Basis and Purpose for the Act, Congress stated as follows:

> (a) the Congress finds that certain individuals, partnerships, corporations, and labor and other organizations may be deterred from seeking review of, or defending against, unreasonable governmental action because of the expense involved in securing the vindication of their rights in civil actions and in administrative proceedings.
>
> (b) The Congress further finds that because of the greater resources and expertise of the United States the standard for an award of fees against the United States should be

different from the standard governing an award against a private litigant, in certain situations.

(c) It is the purpose of this title -

(1) to diminish the deterrent effect of seeking review of, or defending against, governmental action by providing in specified situations an award of attorney fees, expert witness fees, and other costs against the United States; and

(2) to insure the applicability in actions by or against the United States of the common law and statutory exceptions to the 'American Rule' respecting the award of attorney fees (5 U.S.C. Section 504).

The Petitioner contends that the congressional purpose of the Act states clearly that the government's underlying activity must be considered in evaluating the government's "position." Further support for this contention may be found in numerous court decisions.

For instance, the United States Court of Appeals for the Third Circuit, in its decision in the matter of Natural Resources Defense Council, Inc. v. U.S. Environmental Protection Agency, (supra.), considered the meaning of the

term "position" in the Act, and ruled as follows:

> Among the trial courts, a significant number of well-reasoned opinions have held that the underlying conduct of the agency, not merely its trial conduct, must be considered. Moholland v. Schweiker, 546 F. Supp. 383 (D.N.H. 1982); Nunes - Correia v. Haig, 543 F. Supp. 812 (D.D.C. 1982); Wolverton v. Schweiker, 533 F. Supp. 420 (D. Idaho 1982); Photo Data, Inc. v. Danforth Sawyer, 533 F. Supp. 348 (D.D.C. 1982); Gava v. United States, No. 817-78, slip op. at 23 (Ct. Claims Tr. Div., July 20, 1982).
>
> We hold that the word 'position' refers to the agency action which made it necessary for the party to file suit. The statute's legislative history establishes beyond question that Congress intended that the statute provide an incentive for suits to control agency actions, not merely to make Justice Department litigators behave.
>
> There are overwhelming references to that effect and none to the contrary.

The Third Circuit went on to say the following:

> Two courts of appeals seem to have adopted the dissent's position that 'position of the United States' refers to the 'position of the United States taken in litigation before the courts', rather than the 'position taken by an agency of the United States which made it necessary for the

party to file the action' (Broad Avenue Laundry and Tailoring v. United States, 693 F. 2d 1387 (Fed. Cir. 1982); Tyler Business Services, Inc. v. National Labor Relations Board, 695 F. 2d 73 (4th Cir. 1982)). See also S&H Riggers & Erectors, Inc. v. OSHRC, 672 F. 2d 426 (5th Cir. Unit B, 1982).

The interpretation adopted by the dissent and the Broad Avenue, Tyler, and Riggers courts means that no matter how outrageously improper the agency action has been, and no matter how intransigently a wrong position has been maintained prior to the litigation, and no matter how often the same agency repeats the offending conduct, the statute has no application, so long as employees of the Justice Department act reasonably when they appear before the court. Such an interpretation ignores a defined term in the statute:

'(c) United States includes any agency and any official of the United States acting in his or her official capacity' (28 U.S.C. Section 2412 (d) (2)(c)).

While the statute does not define 'position', it does define 'United States' disjunctively. Thus plainly, position of the United States' means position taken by 'any agency and any official of the United States acting in his or her official capacity.' Only hostility to the underlying legislative purpose, we suggest, would permit a reading of the words 'position of the United States' in isolation from the accompanying definition.

Other courts have likewise struggled with the meaning of the term "position" as it is

used in the Act. For example, the United States District Court for the District of New Hampshire reached the following conclusion in its Moholland v. Schweiker decision:

> ...the Act is intended to proscribe frivolous government action that forces a party to resort to the courts to redress its rights. It would contradict the remedial purpose of the Act to interpret it to isolate and focus upon the reasonableness of only a single element of the government's actions, when the entire factual background may suggest a contrary conclusion...
>
> ...the purpose of the Act is to place small litigants and the government on equal financial footing so that the economics of challenging an unreasonable government position will not negatively impact on the decision to seek judicial relief. Obviously, this determination is made prior to the action, and therefore will not be swayed by the potential that the government might not comport itself with proper adversial etiquette.
>
> Furthermore, there were remedies to recalcitrant litigation behavior available prior to the enactment of the Act. See, Webb v. Harris, 88 F.R.D. 170 (N.D. Ill. 1980). There is no logical need for remedial legislation to provide what was already available. The focus under 28 U.S.C. Section 2412 (d)(1)(A) is upon the government's position on the underlying litigation, and not its trial conduct (546 F. Supp. 383 (D.N.H. 1982)).

Finally, the Court of Appeals for the Third Circuit noted as follows:

> ...the purposes underlying the Act would best be effected by examining both the government's position at the administrative level which prompted a party to make the decision to litigate and the government's position during the litigation. Under this standard, fees would be awarded to a prevailing party to the extent that the government's action in causing a party to litigate and to continue to litigate was not substantially justified. Thus, unless and until the government's position, starting at the agency level, is or becomes substantially justified, fees should be awarded to a prevailing party.
> ...examination merely of the government's litigation position would mean that no matter how improper the agency conduct that caused the suit to be filed or no matter how capriciously that position was maintained prior to suit, even after substantial sums have been expended to institute suit, the government can avoid payment of any fees merely by taking corrective action or by maintaining a different, although justifiable, litigation posture. This anomalous situation would contravenue the overriding concern repeatedly expressed by the Congress to remove the specter of overwhelming litigation costs from a party's determination of whether to contest unreasonable governmental conduct (Natural Resources Defense Council, Inc. v. U.S. Environmental Protection Agency, supra).

Petitioner turns now to the Supreme Court for resolution of this conflict between circuits. If, as the Federal Circuit has maintained, a prevailing party can only recover attorney's fees and expenses under the Act when a Department of Justice litigator misbehaves in some way, the already-existing Federal Rules of Civil Procedure and ethical considerations governing such misconduct are not needed.

Moreover, the Federal Circuit's limited view that scrutiny of the agency's actions are not essential to a proper review of an application under the Act is likewise erroneous. It is apparent that small business concerns, like the Petitioner, cannot afford to litigate with the govenment unless there is some way to recover the expenses of that litigation. It is also apparent that small business concerns would not resort to litigation unless the government, at its agency level, had acted improperly.

The Petitioner faces a situation where it has expended more in attorney's fees and costs than it has won from the government. Despite being a "prevailing party," as contemplated in the Act, Petitioner has, to this point, been denied the award which would make it whole. This is an inequitable situation, and can only be corrected by this Court's review, and clear definition of, the Equal Access to Justice Act.

WHEREFORE, Petitioner respectfully requests the Court to grant its Petition for Certiorari.

This 16th day of April, 1984.

/s/ H. Robert Ronick

H. ROBERT RONICK
Counsel of Record for
Petitioner

470 East Paces Ferry Road
Suite 2000
Atlanta, Georgia 30363

IN THE SUPREME COURT
OF THE UNITED STATES OF AMERICA

MORRIS MECHANICAL ENTERPRISES, INC.,

Plaintiff,

v. NO. _____

THE UNITED STATES,

Defendant.

CERTIFICATE OF SERVICE

This is to certify that I have this date served three true and correct copies of the within and foregoing Petition for Certiorari upon the Honorable Rex E. Lee, Solicitor General of the United States, by depositing the same in the United States Mail with adequate postage affixed thereto to assure delivery and addressed as follows:

Honorable Rex E. Lee
Solicitor General of the United States
Department of Justice
Washington, D.C. 20530

This 16th day of April, 1984.

H. Robert Ronick

H. ROBERT RONICK
Counsel of Record for
Petitioner

k. APPENDIX

(i) The Opinion of the Court of Appeals for the Federal Circuit, Including the Denial of Petitioner's Petition for Rehearing in Banc.

UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

MORRIS MECHANICAL ENTERPRISES, INC.,	)	
Appellant,	)	Appeal No. 83-938
v.	)	
THE UNITED STATES,	)	
Appelle.	)	

DECIDED: February 24, 1984

Before RICH, DAVIS, BENNETT, MILLER, and SMITH, Circuit Judges.

SMITH, Circuit Judge.

In this attorney fees and costs case, Appellant Morris Mechanical Enterprises, Inc. (Morris), appeals from a judgment of the United States Claims Court denying its application for attorney fees and other expenses incurred in prevailing on the merits in a Government contracts suit against the General Services Administration (GSA). We affirm.

Issues

We face three issues here: first, whether the Claims Court had jurisdiction under the Equal Access to Justice Act (EAJA)[1/] to entertain the Morris' fee and costs application; next, whether the Claims Court correctly examined the "position of the United States" in accordance with the EAJA; and finally, whether the Claims Court correctly applied the "substantially justified" test under the EAJA.

Background

The summary facts material to this appeal

1/ Section 2412(d)(1)(A) of 28 U.S.C. (Supp. V 1981) provides generally that a court may award fees and other expenses to a prevailing party other than the United States "unless the court finds that the position of the United States was substantially justified." (Emphasis supplied.)

are:[2/] Morris, a small business, contracted with GSA to supply chiller and to perform certain "start-up" services on it. The delivery of the chiller was 231 days late for reasons beyond Morris'control -- a strike hampering its supplier, Airtemp. Even after delivery and again for reasons beyond Morris' control, installation of the chiller was delayed. Fianally, 6 months after delivery and promptly after installation, Morris provided the "start-up" services for the chiller, thereby completing its contract. Meanwhile, the United States had withheld $23,100 from Morris' contract price -- liquidated damages of

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2/ A complete statement of the facts is contained in the opinion below by Judge Spector, Cf. Morris Mechanical Enters., Inc. v. United States, 1 Cl. CT. 443 (1983).

$100 per day for 231 days -- for failure to complete the work on time. Morris contested the withholdings of damages and received a judgment on the merits in its favor for $23,100, issued by the Claims Court in November 1982. Morris applied in December 1982 to the Claims Court for fees and costs under the EAJA and received a denial, the subject of this appeal, in March 1983.

Opinion

A.

Initially we face a jurisdictional issue raised because of the transitional nature of this case. Morris originally filed in the Court of Claims in September 1980 for recovery of the withheld damages and a trial was held in February 1982. The decision on the merits was issued in November 1982, after the Claims

Court, pursuant to the Federal Courts Improvement Act (Pub. L. No. 97-164, 96 Stat. 25), succeeded to the trial functions of the Court of Claims effective October 1, 1982. Morris' fee application followed shortly thereafter. The Government argues that the Claims Court, said not to be a "court of the United States," lacks jurisdiction to entertain requests for fees and costs under the EAJA. We need not reach this issue now, however, because we find, as in our recent decision in Ellis v. United States, 711 F.2d 1571 (Fed. Cir. 1983), that this case constitutes a transition "matter," commenced in the Court of Claims, carried over by statute to the Claims Court, and decided by that court after October 1,

1982.[3/] The Claims Court therefore properly entertained the EAJA application and our appellate jurisdiction to review follows therefrom.

B.

We next face Morris' contention that the Claims Court incorrectly construed the

3/ See §403(d) of the Federal Courts Improvement Act (Pub. L. No. 97-164, 96 Stat. 25) and discussion thereof in Ellis v. United States 711 F.2d 1571 (Fed. Cir. 1983). We note that in this case both Morris' fee application and the Claims Court decision thereon occurred after October 1, 1982, whereas in Ellis the fee application and subsequent decision "straddled" that date. However, the Morris EAJA fee and cost application is so intertwined with the litigation on the underlying issues as reasonably to constitute on "matter" for purpose of §403(d). To find otherwise would fly in the face of the congressional purpose behind §403(d) -- to provide "for the orderly disposition of cases pending on the effective date [October 1, 1982] of the bill." Ellis at 1574, citing S. REP. No. 275, 97th Cong., 2d Sess. 32 (1981), reprinted in 1982 U.S. CODE CONG. & AD. NEWS 11,42.

"position of the United States" under the EAJA as encompassing only the Government's litigating position, as opposed to including the agency action which casued the litigation. We have rejected this argument in Broad Avenue Laundry & Tailoring v. United States, 693 F.2d 1387 (Fed. Cir. 1982), again in Bailey v. United States, 721 F.2d 357, (Fed. Cir. 1983), and do so once more here.

C.

Finally, we turn to the heart of Morris' argument, which is that the Claims Court incorrectly concluded that the Government's position in litigating the dispute about the chiller was "substantially justified" such that Morris could not be awarded fees and costs under the EAJA. Morris has argued persuasively the equities of its case -- that a small

business is particularly deserving of an award where, as here, the Government's litigation against the small business has caused it to incure nearly as much in attorney fees and costs as it recovered in ultimately prevailing against GSA.[4/]

As stated in Broad Avenue, the test for determining whether the Government's litigating position is substantially justified is one of reasonableness, depending upon all the pertinent facts in a given case. 693 F.2d at 1391. Bearing in mind this test, we cannot say that Judge Spector erred in concluding that the Government's litigating position was substantially justified, viewing events as they occurred rather than with the benefit of

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4/ See Morris Mechanical, 1 Cl. Ct. at 445.

hindsight. Until trial both parties had focused only on the issue of Morris' responsibility for late delivery of the Airtemp chiller. The Government had contended that Morris had failed to give timely notice to GSA of the late delivery, and that Morris had as well known of the Airtemp strike prior to the issuance of the invitations for bids on the contract which Morris was awarded. The fact that Morris successfully refuted these contentions at trial does not mean, given all the circumstances, that the Government's litigating position was not substantially justified. Moreover, as the court below points out, it was not until trial and in post-trial briefing that facts developed concerning events and delays unrelated to Morris' delivery and concerning its later "start-up" services on the

chiller.[5/] Since prior to trial neither party had pursued these avenues, we cannot find that the Government's view that a genuine dispute existed was unreasonable, and we, therefore, affirm Judge Spector's finding on substantial justification.

Conclusion

We affirm the Claims Court on the jurisdictional and legal issues presented herein for the reasons discussed above.

AFFIRMED

5/ Id. at 445-46

UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

MORRIS MECHANICAL ENTERPRISES, INC.,

Appellant,

v.

THE UNITED STATES,

Appellee.

NO. 83-938

ORDER

A suggestion for rehearing in banc having been filed in this case.

UPON CONSIDERATION THEREOF, it is Ordered by the court that the suggestion for rehearing in banc be, and the same is hereby, Declined.

FOR THE COURT

George E. Hutchinson,
Clerk

March 23, 1984
Date

cc: H. Robert Ronick
M. Susan Burnett

(ii) The Opinion of the United States Claims Court Ordering Return of the Liquidated Damages to the Petitioner.

IN THE UNITED STATES CLAIMS COURT

No. 508-80C

(Filed: November 17, 1982)

MORRIS MECHANICAL ENTERPRISES, INC.	)	Contracts; delays-liguidated damages; delays of subcontractor and lower tier suppliers; causal relationship between delays and contractor's failure to complete the work within the time specified; extensions of time.
v.	)	
THE UNITED STATES	)	

H. Robert Ronick, attorney of record for Plaintiff. Janet F. Perlman, Katz, Paller & Land, of counsel.

Frank M. Rapoport, with whom was Assistant Attorney General J. Paul McGrath, for Defendant.

OPINION

Statement of Facts

SPECTOR, Judge: This is a contract case arising out of a project for the development of a Federal law Enforcement Training Center on an old military base at Glynco, Georgia. The project was administered by the General Services Administration (GSA). Instead of awarding a single prime contract for construction of the project, with the various aspects of the work then being performed by subcontractors coordinated by and working under that prime contractor, GSA elected to award a multiplicity of prime contracts for the various segments of the work.[1/] Still another prime contract was awarded to Lasker-Goldman

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1/ The testimony indicates that there were from 35 to 57 separate prime contractors on the site.

Corporation to act as construction manager.

Plaintiff is a small mechanical contractor specializing in heating and air conditioning systems, which it has installed in settings ranging from family homes to major military installations. Government contracts account for about 70% of its business and it has successfully performed several of these at prices ranging from $100,000 to about $1 million. On this project, Plaintiff was one of that multiplicity of prime contractors. Its sole obligation was to buy and deliver to the project site a 650-ton centrifugal chiller,[2/] which was then to be installed by another prime contractor.

2/ A chiller cools a quantity of water and circulates it through coils over which air is blown and chilled, and then circulated to areas to be cooled.

Ordinarily the Government or its general prime contractor for the entire project would purchase the chiller directly from one of the major air conditioning manufacturers, which would bid to and contract directly with the Government, or that general prime contractor.

In this instance, however, Plaintiff was the "beneficiary" of GSA's small-business set-aside program. It was awarded a prime contract covering just the purchase of the chiller, as a means of satisfying the agency's small business set-aside requirements, As a result, one of the major manufacturers of air conditioning equipment was destined to become a bidder to, and subcontractor under, a small business entity.[3/] This effectively eliminated bids

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3/ Plaintiff was founded in 1977 by Jerry Morris. A small business is an independently owned and operated firm which is not dominant in the area in which bids are being invited, and which has average annual receipts of less than $12 million in the 3 years preceding its bid. Plaintiff qualified under these criteria.

that large chiller manufacturers would ordinarily have submitted direcly to Defendant.

Defendant issued a pre-invitation notice for purchase of the chiller on November 16, 1977, and Plaintiff Morris picked it up in a commercial periodical. The notice indicated an estimated cost of $25,000 to $100,000, well within Mr. Morris' experience, so he sent for the invitation and contacted three major manufacturers, Carrier, York, and Airtemp. Plainitff was intially most impressed with the York chiller because it best fit the contract requirements and was in fact that only chiller which would exactly satisfy the length and width requirements.[4/] But York refused to set a firm delivery date, an important factor since the

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4/ The chiller was to be placed in a building corridor adjacent to an existing 440-ton chiller already in operation, so they could supplement one another.

proposed contract required delivery within 120 days of receipt of a notice to proceed from Defendant. Carrier also refused to set a firm delivery date, and in addition refused to perform certain factory tests required by the proposed contract. In addition, the Carrier chiller was far too large to meet the limited space requirements.[5/] That left Airtemp as the only manufacturer willing to schedule a firm delivery date and to perform the necessary factory tests.[6/]

Defendant issued its Invitation for Bids on December 16, 1977 and Plaintiff submitted its responsive bid in the amount of $78,763 on February 23, 1978. Six other bids ranging in

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5/ As testified by Lasker-Goldman's (the construction manager) representative on the site.

6/ Its chiller was also less expensive than the others.

amount from $93,970 to $165,800 were received.[7/] The 120-day (17 weeks) delivery requirement was extremely tight. Evidence of record shows that it ordinarily takes 16 to 26 weeks to produce and deliver such a piece of equipment. Unknown to Plaintiff, Defendant's construction manager, Lasker-Goldman, had in fact informed Defendant based on its own investigations of six major manufacturers[8/] that the requisite chiller could not be produced and delivered in less than 19 to 20 weeks.

By late February 1978, Plaintiff's efforts has necessarily focused on Airtemp, a reputable

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7/ Lasker-Goldman's representative explained these much higher bids as reflecting foreseeable delays, and the need for a bidder to include contingencies in its bid to cover liquidated damages which might be assessed.

8/ Including the three contacted by Plaintiff.

subsidiary of Chrysler Corporation, which had produced chillers for many years. He talked with Charles D. Woodward, a manufacturer's representative for Airtemp and for other mechanical equipment manufacturers in the Atlanta area.[9/] Woodward was authorized to quote on equipment, subject to Airtemp's acceptance. Since he had no authority to bind Airtemp to a contract, Plaintiff asked him to obtain a specific delivery date. In a letter dated March 1, 1978, Woodward replied:

> Airtemp has indicated that they can ship this machine by July 10, 1978, based on a tentative order this week. Assuming we can delay the starting date for the Government schedule with submittal and bonding procedures, we should have no problem meeting the 120 day specified schedule.

9/ Woodward is an independent businessman, and a registered professional engineer in Georgia.

He further promised that "[i]n the event that production delays occur, and we are unable to obtain an extension of the government schedule," he would be willing to reimburse Plaintiff for half its liqidated damages, up to a total of $2000. This promise reflected Woodward's confidence, based on assurances from Airtemp, that the chiller would be delivered on time.[10/] He testified that in accordance with standard industry practice he considered July 10, 1978 to be a firm delivery date and that he was so assured by Airtemp. Soon after he received Woodward's letter, Plaintiff spoke with Airtemp's national sales manager and

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10/ His letter to Plaintiff stated: "Airtemp management is confident that they can meet this schedule. If you would like to discuss it with them directly, the national sales manager is Ted Lembeck and his office is in Edison (New Jersey)."

received assurances that the Airtemp chiller would be delivered by July 10, 1978. Under these circumstances it was reasonable for Plaintiff to assume that the July 10, 1978, delivery date was firm.

On March 3, 1978, Plaintiff issued a purchase order for a 650-ton chiller to Airtemp "[s]ubject to and in full accordance with the attached job specifications." The purchase order plainly stated that the "[c]hiller must be shipped on or about July 10, 1978". In an Airtemp order form dated March 6, 1978, Woodward submitted Plaintiff's order to Airtemp. It will be noted that this preceded by almost a month the award of a contract to Plaintiff by Defendant. Plaintiff knew it was the low bidder, and wanted to place its order as early as possible in order to insure timely delivery. Also in an effort to save time, on March 6,

1978, Plaintiff submitted to GSA certain relevant information about the chiller it would buy.[11/] The contract was awarded to Plaintiff on March 29, 1978. On April 18, 1978 Plaintiff received its notice to proceed which started the running of the 120-day delivery schedule, thereby fixing the delivery date of August 19, 1978.

The issues in this case are governed by Clause 5, "General Provisions," providing in relevant part as follows:

(a) * * * Whether or not the Contractor's right to proceed with the work is terminated, he and his sureties shall be liable for any damages to the government resulting from this

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11/ This submission was originally rejected (March 16, 1978) as "too big for the available space." Later (June 1978) after explanations as to the chiller's design, the submittal was accepted.

refusal or failure to complete the work within the specified time.

* * * * *

(c) If fixed and agreed liquidated damages are provided in the contract and if the Government does not so terminate the Contractor's right to proceed, the resulting damage will consist of such liquidated damages until the work is completed or accepted.

(d) The Contractor's right to proceed shall not be so terminated nor the Contractor charged with resulting damage if:

(1) The delay in the completion of the work arises from unforeseeable causes beyond the control and without the fault or negligence of the Contractor, including but not restricted to, acts of God, acts of the public enemy, acts of the Government in either its sovereign or

contractual capacity, acts of another Contractor in the performance of a contract with the Government, fires, floods, epidemics, guarantine restrictions, strikes, freight embargoes, unusually severe weather or delays of subcontractors or suppliers arising from unforeseeable causes beyond the control and without the fault or negligence of both the Contractor and such subcontractors or suppliers; and

(2) The Contractor, within 10 days from the beginning of any such delay (unless the Contracting Office grants a further period of time before the date of final payment under the contract) notifies the Contracting Officer in writing of the causes of delay.

* * * * *

(g) As used in Paragraph (d)(1) of this clause, the term "subcontractors or suppliers" means subcontractors or suppliers at any tier. [Emphasis supplied.]

Special condition 4.6 provided for payment of liquidated damages to Defendant if Plaintiff failed to complete its contractual obligations within the term specified in the contract, or as extended. Supplemental special condition 7.1 fixed liquidated damages at $100 per day of delay.

Around April 1978, Plaintiff learned for the first time that Airtemp would apparently be unable to ship before August 15, 1978. In a letter dated April 17, 1978, Plaintiff advised Airtemp's national sales manager that Woodward had promised a firm delivery date of August 15, 1978 and he asked for confirmation of that date, reiterating his concern that the chiller

be delivered in time for Plaintiff to meet its delivery date. Plaintiff then wrote Woodward on the day following his receipt of the notice, to proceed, urging that the chiller be delivered on the site by August 17, 1988.

On May 1, 1978, Airtemp's national sales manager (Lembeck) confirmed in writing that the Airtemp chiller was scheduled for delivery no later than August 15.[12/] But on May 1, 1978, Plaintiff learned that the delivery date had apparently slipped once again. Based on repeated assurances he had received from Airtemp officials in New Jersey, Woodward had written Plaintiff on June 30, assuring him the chiller would be delivered by September 30, 1978.

12/ He added: "I know this date is later than anticipated and wish to advise that we will do everything possible to hold and improve if possible the August 15th schedule."

It will be recalled that Plaintiff was first to buy and deliver the chiller. It then was to be installed under another prime contract which had been awarded to Ivey's Plumbing and Electrical Co., Inc.[13/] Following that, Plaintiff was to provide necessary start-up services. Ivey's Plumbing received its notice to proceed on July 10, 1978, and had 357 days (or unitl July 2, 1979) to complete its work.

On August 16, 1978, Airtemp's regional manager informed Plaintiff that the chiller had been "rescheduled to ship October 31, 1978 due to vender [sic] supply parts and delays in our production line caused by movement of the Airtemp manufacturing facility." The latter

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13/ Ivey's Plumbing was also to install an underground water system and related work.

referred to the relocation of its Bowling Green Kentucky, facilities to Edison, New Jersey, in response to an unresolved labor strike which had begun about 10 months before Plaintiff placed its order. Plaintiff had not then been made aware of the strike by Woodward or any other Airtemp representative.

Airtemp's Mr. Lembeck wrote Woodward on August 12, 1978, claiming that the chiller motor had been damaged in shipment, that it was being returned to the manufacturer for inspection, and that this might affect the delivery of the chiller. This information was passed along to Plaintiff.[14/]

14/ It later appeared on the occasion of a visit by Plaintiff to the Airtemp factory in New Jersey that the motor was not in fact damaged, although it may have been returned for repair.

By the late summer or early fall of 1978, Plaintiff became concerned about Airtemp's reliability and recontacted Carrier and York. As they had done earlier, these manufacturers declined to set a firm delivery date. And Carrier reiterated its refusal to perform factory tests required by the contract. Plaintiff became resigned to the fact that Airtemp remained its best hope for receiving a chiller in the shortest possible time.

In September 1978, Plaintiff heard from Lasker-Goldman's Mr. Norton regarding the slippages in delivery date. According to Plaintiff, Norton indicated that "GSA probably could live with a September 15 but not a September 30 delivery date." Plaintiff in turn wrote Woodward reminding him that it was "imperative that we deliver the chiller at the earliest possible date." In early October

1978, Woodward traveled to the Airtemp factory in New Jersey and was assured by officials there that they would meet their most recent commitments, but Plaintiff having received a report that delivery would not be made until December 8, 1978, wired an Airtemp vice-president, and emphasized the need for prompt delivery.

A chiller such as this is not manufactured 100% inhouse but rather certain components are supplied by other manufacturers. In this case Airtemp was producing the chiller's compressor, but was relying on other manufacturers for the chiller's shell, tube exchangers, and motor. At this point, Airtemp began blaming some of its problems on its suppliers.[15/] In an October 3, 1978 letter to Plaintiff, Airtemp

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15/ See note 14, supra.

indicated that one of its suppliers had failed to supply the shell and tube heat exchangers on time, and that the move to New Jersey had resulted in difficulty in locating some suppliers and in starting up assembly lines.

By letter dated October 6, 1978, Plaintiff asked GSA for an extension of time. It supported the request with a review of its dealings with Airtemp, indicating that the delay was unforeseeable on Plaintiff's part and beyond its control and without its fault or netgligence. Defendant replied by asking for more information.[16/]

Airtemp sought to provide Plaintiff with information supporting the latter's request for

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16/ Although it was Lasker-Goldman's responsibility to coordinate the work of all the other prime contractors on the site, GSA had retained sole authority to grant extensions of time and to approve changes involving additional compensation.

a time extension in a letter of November 17, 1978 describing its strike at Bowling Green, and the delays of a supplier, Process Engineering Machine Co. (Pemco). However, it prefaced those comments with this discouraging remark:

> First of all, it is our position that we never agreed to an unconditional or fixed delivery date. Secondly, we never accepted and do not accept any responsibility for consequential or incidental damages.

Finally in December 1978, Plaintiff and Woodward together visited the Airtemp factory in New Jersey. They found it was still experiencing delays, now attributed to Pemco, a supplier.

At this time, Plaintiff asked GSA to intercede with Airtemp to expedite delivery of

the chiller. It is customary for Government employees to assist in this way and expediters and priority systems are often employed in this way. Strangely, GSA refused to play any part in the matter, claiming that its "standards of conduct" prohibited it from assisting in expediting delivery. It was apparently referring to an unrelated Section 105-735,.201(b)(2) of its Standards of Conduct which might result in or create the appearance of "[g]iving preferential treatment to any person."17/

Plaintiff also asked Lasker-Goldman, GSA's contract manager, for expediting assistance with Airtemp, and Lasker-Goldman did contract Airtemp, but with no apparent success. In

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17/ It should be noted that GSA was very sensitive to on-going investigations of the agency at this time.

January and February 1979, Plaintiff was informed by Airtemp that delivery had slipped to late Febrary and then to mid-March; and it was warned by Lasker-Goldman that the delay was "seriously affecting the completion of several projects" and that Plaintiff could expect the assessment of liquidated damages. Plaintiff wired Airtemp again complaining of the delay and insisting on prompt delivery.[18/]

Meanwhile, Plaintiff's October 6, 1978 request to GSA for an extension of time had languished. Defendant declined to act on it even after a discussion between GSA, Woodward

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18/ It should be emphasized that Plaintiff's expediting efforts were not confined to the letter, wires and visits to Airtemp cited in the text. Plaintiff was also in constant touch with Airtemp by telephone, and also kept in close touch with GSA and Lasker-Goldman concerning the delays.

and Plaintiff on April 13, 1979.[19/] Defendant wanted more information on the Bowling Green strike, Airtemp's attempts to minimize the impact of its move, and Airtemp's efforts to remedy its problems. This information was under the control of Airtemp which was now refusing to release any information to Plaintiff. Delivery of the chiller to the site was accomplished on April 7, 1979. This was 231 days after the scheduled delivery date of August 18, 1978. This completed Plaintiff's purchase and delivery obligation, but not

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19/ The earlier partially-quoted Clause 5 "General Provisions" further provides at (d)(2) that:

"The Contracting Officer shall ascertain the facts and the extent fo the delay and extend the time for completing the work when, in his judgment, the findings of fact justify such an extension, and his findings of fact shall be final and conclusive on the parties, subject only to appeal as provided in Clause 6 of these General Provisions. (Emphasis supplied).

"start-up" services to be performed after the chiller had been installed by another prime contractor, Ivey's Plumbing.

However, the chiller was not immediately moved into the building where it was to function, because a dispute arose as to whether or not its condenser heads were properly located. Ivey's Plumbing refused to reverse the heads, a comparatively simple task taking a few hours, and it furthermore refused to install the chiller until the heads were reversed. According to Plaintiff and Woodward, the heads were located where they had been shown on Plaintiff's approved submittals (or were not previously required to be detailed) and hence not subject to later objection. Lasker-Goldman's Mr. Norton was unwilling to assign blame for the need to reverse the condenser heads. GSA sided with Ivey's

Plumbing. Neither GSA nor Lasker-Goldman resolved this minor problem for several months. There was another minor problem arising out of the need for an electrical disconnect switch (not previously mentioned) and Lasker-Goldman and Defendant agreed that Ivey's Plumbing should provide this and be reimbursed.

There were other far more serious problems delaying installation by Ivey's Plumbing. These were in no way related to Plaintiff's contract nor attributable to Plaintiff. The equipment room in which the chiller was to be installed had not been completed when the chiller arrived. Moreover, all connection and locations of items had not been worked out. Structural problems in the room, particularly in the ceiling, had to be accommodated, resulting in at least one "stop order" by GSA, lasting from March 1, until May 14, 1979.

Another problem unrelated to Plaintiff's performance arose when workers discovered that unknown, subsurface underground obstructions on this old military site would interefere with the construction of this project. Lasker-Goldman's representative testified that these problems were entirely beyond Plaintiff's control, and would have delayed installation of the chiller even had it been delivered by Plaintiff as scheduled. He further testified that part of the problem was GSA's inability to issue notices and change orders promptly.[20/]

Plaintiff requested payment for the chiller on May 16, 1979. On May 17, 1979

20/ He testified that: "At this time there was because there was [sic] a lot of investigations going on about GSA, and there were so many review boards set up for change orders that it just -- by the time it went across five men's desks, it slowed a change order down that much."

Defendant approved payment of $55,663 to Plaintiff, and withheld the balance of $23,100 as liquidated damages for 231 days at $100 per day. When Plaintiff visited the site in June of 1979, the chiller was still sitting where it had been delivered, and the equipment room was still not ready to receive it.

On June 11, 1979, Defendant asked Ivey's Plumbing to submit a proposal to relocate a starter on the chiller so that it would not interfere with overload pipes in the equipment room, and also to install a disconnect switch which it acknowledged was "not on contract drawings". In submitting its proposal Ivey's Plumbing asked for a time extension of 289 days, consisting of 46 days for relocating the starter, and the remainder of 243 days for "delay turn over [sic] of the government

furnished chiller."[21/]

When Woodward visited the site in July 1979, it appeared that Ivey's Plumbing had finally been persuaded to move the chiller into the area in which it was to be installed, but it had not yet been connected electrically or mechanically, and the electrical disconnect switch to be added by Ivey's had not yet been connected to the chiller.[22/]

On August 2, 1979, Lasker-Goldman recommended that Ivey's Plumbing be given a 44 day time extension from July 2, 1979 (its scheduled completion date) to August 15, 1979

21/ Contrast this with Lasker-Goldman's testimony that the equipment room was not ready to receive the chiller when it arrived.

22/ On July 2, 1979 Plaintiff brought in one mechanic to reverse the condenser heads in a period of 4-6 hours. Defendant authorized Ivey's Plumbing to relocate the starter on July 23, 1979, at a cost not to exceed $9,138.

"due to the late delivery of the chiller, changing of chiller heads, and the relocation of the starter." This recommendation was approved by GSA on October 18, 1979. Note that the chiller had been delivered on April 7, 1979.

The testimony as to what, if any, actual delay resulted from late delivery of the chiller is confused and unreliable. Even GSA's witness attributes a maximum of 44 days to that problem. It was not until the fall of 1979 that Plaintiff was asked for and promptly provided "start-up" service for the chiller. The Chiller did not become fully operational until at least several months after that. When Plaintiff, on November 7, 1979, requested the release of the $23,100 being withheld on its contact, Lasker-Goldman recommended that the claim be denied and Defendant denied it on

April 28, 1980. Apparently no other contractor was assesed damages for delay.

It is noteworthy that Lasker-Goldman's Mr. Norton testified that, although this chiller originally lay on the "critical path" of the Glynco project, subsequent events and delays in other areas, had removed the chiller from the "critical path."[23/]

Discussion and Conclusions

The language of the standard contract provision on which this case hinges has been a prolific source of administrative and judicial litigation, and that language had gone through successive changes in apparent response to the litigation. Had Plaintiff's contract, for example, contained the language set forth in

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23/ Items on the "critical path" are those which if delayed, could delay overall completion of the project.

the landmark Andresen decision,[24/] there could be little doubt that it would prevail on the facts present in this case. In Andresen, as here, the contractor was a small business delivering material to the Government. The material was in turn being purchased from the plant of a large, and theretofore reliable supplier. When the supplier unexpectedly failed to deliver, the contractor purchased the material elsewhere, but not in time to meet the contract schedule. The "Delays-Liquidated Damages" clause provided that:

> [A] contractor shall not be charged with liquidated damages when the delay in delivery is due to unforeseeesable causes beyond the control and without the fault of the contractor, including but not restricted to * * * delays of a subcontractor due to such causes * * *.

24/ Appeal of John Andresen & Co., Inc. Armed Services BCA No. 633, Decemeber 13, 1950; 5 CCF 61,182

The Board concluded that Andresen could not foresee--

> that a subcontractor of such standing would fail to carry out its contractual obligations. The cause of the delay was beyond the control of the contractor. By the time it was known that the supplier would not make timely delivery, the kipskins could not have been purchased on the open market or from any source in time to make the deliveries. The contractor did everything reasonably possible to perform on time. There was no evidence of fault or negligence on the part of the contractor.

Although the standard provision relating to delays and liquidatd damages is obviously intended as a contingency-eliminating clause (i.e., the contractor is not intended to be an insurer against delays which it is powerless to prevent), the drafters of the clause thereafter modified it to provide otherwise with respect to delay of subcontractors which were not foreseeable by or due to the fault or negligence of the contractor. The corresponding contract language in the later

case of Schweigert, Inc. v. United States,[25/] reads as follows:

> (d) The Contractor's right to proceed shall be so terminated nor the Contractor charged with resulting damage if:
>
> (1) The delay in the completion of the work arises from unforeseeable causes beyond the control and without the fault or negligence of the Contractor, including but not restricted to, Acts of God, acts of the public enemy, acts of the Government in either its sovereign or contractual capacity, acts of another contractor in the performance of a contract with the Government, fires, floods, epidemics, quarantine restrictions, strikes, freight embargoes, unusually severe weather, or delays of subcontractors or suppliers arising from unforeseeable causes beyond the control and without the fault or negligence of both the Contractor and such subcontractors or suppliers (Underscoring provided).

25/ 181 Ct. Cl. 1184, 388 F.2d 697 (1976).

In Schweigert, the parties agreed that the delay was not the fault of the contractor or of a subcontractor, with which it was in privity, but rather of a second-tier supplier to the subcontractor. The court held:

> [P]laintiff has recited at considerable length the background of the revisions of the default clause in standard Government contracts which strongly indicated that one of the prime purposes, if not the prime purpose of the clause, is to relieve bidders on Government contracts from contingencies over which they have no control and for which they need not include an item in their bids.[26/] It is consistent with this purpose, so Plaintiff argues, to construe the instand default cluase in a manner to limit the inquiry of fault for delays fo the prime contractor and its immediate subcontractors and suppliers. [Footnote omitted].
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> The tenor of Clause 5(d) suggest that the term "subcontractors," in the context in which it is used, means those whom the principal contractor could control or for whom it was contractually responsible, and not those concerning whose conduct and

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26/ See and cf. note 7, supra, indicating the possible cost in the form of higher bids of "insurance" against delays which are by definition unpreventable.

> reliability a contractor could only hopefully and helplessly speculate[27/]

The language of the clause in this case parallels that in Schweigert, plus a subparagraph (g) which reads as follows:

> As used in Paragraph (d)(1) of this clause the term "subcontractors or suppliers" means subcontractors or suppliers at any tier. [Emphasis supplied].

However, based on the facts in this case, the court can be spared an inquiry of the broad scope, which that additional language would require. The record demonstrated that Plaintiff's repeated requests for an extension of time based on his problems with this supplier was not acted upon by GSA.[28/] The record further demonstrates that there had meanwhile developed far more serious and

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27/ 181 Ct. Cl. at 1189.

28/ See note 16, supra, and preceding text. See also, note 19, supra

supervening delays which were in no way attributable to Planitiff and which became the proximate and effective cause of Plaintiff's inability to complete its work. Damages are to be assessed only for "failure to complete the work within the specified time." Plaintiff's "work" consisted not only of purchasing and delivering a chiller to the site, but also of providing "start-up" service for the chiller after it had been installed and connected up by another prime contractor Ivey's Plumbing.

The record shows taht the equipment room in which the chiller was to be installed had not been completed when the chiller arrived. Connections and locations of items had not been worked out. Structural problems in the room, particularly in the ceiling, had to be accommodated, and GSA had to issue a "stop order" to Ivey's Plumbing. The latter was compensated with generous extentions of time.

Unknown, subsurface, underground obstructions also delayed Ivey's Plumbing and the project.[29/] Therefore, it was not until the fall of 1979 that Plaintiff was finally requested to, and promptly did provide, "start-up" service for the chiller. Even then, the record shows, it did not become fully operational until at least several months thereafter.

In other words, although delivery and start-up of the chilller originally lay on the "critical path" of the Glynco project, subsequent events and delays not attributable to Plaintiff had removed the chiller from the "critical path." Plaintiff could not "complete its work" until Ivey's Plumbing had completed its work, and it did so as soon as the

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29/ See note 20, supra, and preceding text.

equipment was installed and ready for "start-up" services.[30/] Plaintiff is entitled to an extension of time sufficient to permit it to complete its work after installation of the chiller by another contractor and there has been no "refusal or failure to complete the work within the specified time," when it is properly extended for circumstances beyond Plaintiff's control. It follows that Defendant is not entitled to withhold the sum of $23,100 in liquidated damages from amounts otherwise due Plaintiff under its contract, and that judgment in that amount is to be entered in favor of Plaintiff.

30/ Defendant now attributes a maximum of 44 days of delay to Plaintiff. (See text at note 22, supra). But the record does not support a finding that even that relatively short period of delay was attributable to Plaintiff. (See text preceding note 20, supra).

(iii) The March 3, 1983, Judgment of the United States Claims Court Denying Petitioner's Application for Attorney Fees and Expenses Under the Equal Access to Justice Act.

IN THE UNITED STATES CLAIMS COURT
No. 508-80C
(Filed: March 3, 1983)

MORRIS MECHANICAL ENTERPRISES, INC.,	)	Equal Access to Justice Act; application for attorney's fees and other expenses under 28 U.S.C. §2412; jurisdiction; application of the "substantially justified" statutory standard to the litigation history of this specific case.
Plaintiff,	)	
v.	)	
THE UNITED STATES,	)	
Defendant.	)	

H. Robert Ronick, Atlanta, Georgia, attorney of record for plaintiff, Katz, Paller & Land, of counsel.

M. Susan Burnett, Washington, D.C., with whom was Assistant Attorney General J. Paul McGrath, for defendant.

4 USCCR NO. 27

OPINION

SPECTOR, Judge:

On November 17, 1982, it was held in a decision on the merits of this case that plaintiff was:

> entitled to an extension of time sufficient to permit it to complete its work after installation of the chiller by another contractor, and there has been no "refusal or failure to complete the work within the specified time," when it is properly extended for circumstances beyond plaintiff's control. It follows that defendant is not entitled to withhold the sum of $23,100 in liquidated damages from amounts otherwise due plaintiff under its contract and that judgment in that amount is to be entered in favor of plaintiff.[1/]

Plaintiff now applies for attorney's fees and other expenses under the Equal Access to

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1/ Reported at 1 USCCR No. 22. Judgment was entered on November 17, 1982 (Rule 58 of this court). A notice of appeal to the U.S. Circuit Court of Appeals for the Federal Circuit was filed January 17, 1983 (Rule 4(a), FRAP).

Justice Act[2/] which provides in pertinent part that:

> a court shall award to a prevailing party other than the United States fees and other expenses, in addition to any costs awarded pursuant to subsection (a)[3/] incurred by that party in any civil action ... brought by or against the United States in any court having jurisdiction of that action, unless the court finds that the position of the United States was substantially justified... [Emphasis supplied].

Plaintiff's application details attorney's fees for professional services rendered between September 1980 and November 1982, of $21,472.50, consisting of 286.3 hours at $75 per hour; pretrial deposition transcript costs of $129.50, and trial transcript costs of

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2/ 28 U.S.C. § 2412.

3/ These are the costs enumerated in 28 U.S.C. §1920.

$167.06; for a total fees and expenses claim of $21,769.06.[4/]

Defendant's opposition is on the following grounds:

I. This court does not have jurisdiction to entertain applications under the Equal Access to Justice Act.

II. In any event, defendant's position in this case was substantially justified.

III. Even if plaintiff were found to be entitled to recover, some of the fees and expenses claimed may not be recoverable because:

A. They were incurred prior to the effective date of the Act, October 1, 1981.

B. The predecessor of this court (U.S. Court of Claims) did not in the exercise of its discretion, award costs.

C. Any fees and expenses attributable to a claim before the General

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4/ Note that fees and expenses incurred and claimed are almost equal to the amount of the judgment recovered.

Accounting Office (all the amounts claimed relate only to litigation in this court) would not be recoverable.

D. The hourly rate ($75) claimed for attorney's fees, is unreasonable and excessive.

Defendant's attack upon the jurisdiction of this court in these cases has been rejected in a number of prior cases[5/] and it is similarly rejected here. This brings us to the main issue, namely, whether or not defendant's litigation position was "substantially justified."

History of the Underlying Litigation

Briefly summarizing the history of the underlying litigation, for measurement against that statutory standard, we see the plaintiff, a small business, was one of a multiplicity of

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5/ See Hock, Executrix v. United States, 4 USCCr No. 15 (Feb. 24, 1983) (Spector, J.) and cases cited therein at note 4.

prime contractors performing various segments of a construction project for the General Services Administration.[6/] This necessarily increased GSA's responsibility for coordinating the work of the various prime contractors, a responsibility which would ordinarily be assigned to a single prime contractor charged with coordinating the work of a multiplicity of his subcontractors.

Plaintiff is a small mechanical contractor specializing in the installation of heating and air conditioning systems. In this instance, GSA, in fulfilling its quota under the small business set-aside program, awarded plaintiff a prime contract covering just the purchase of a chiller by plaintiff from one of the major

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6/ Testimony at trial indicated there were from 35 to 57 separate prime contractors on the site.

manufacturers of air conditioning equipment. Following delivery of the equipment to the site by the manufacturer, it was to be installed in a building by another prime contractor, Ivey's Plumbing. After installation by Ivey's Plumbing, plaintiff was to complete the work called for under its contract by performing certain "start-up" service on the chiller.

Plaintiff ordered the chiller from Airtemp, the only major manufacturer which could meet the size, factory tests, and delivery requirements. Plaintiff was awarded the contract on its low bid of $78,763. For reasons beyond the control and without the fault or negligence of plaintiff, Airtemp did not deliver the chiller to the site until 231 days after the delivery date it had promised. This may or may not have also been beyond the control and without the fault or negligence of

Airtemp, which was hampered by a strike and by problems with its suppliers.

But even after delivery of the chiller, Ivey's Plumbing could not install it in the building where it was to function for reasons unrelated to plaintiff's contract or otherwise attributable to plaintiff. The equipment room had not been completed. Connections to and locations of equipment had not been completed or ascertained. Structural problems in the room, particularly in the ceiling, had not been worked out. Stop orders were issued by GSA. Workers discovered unknown, subsurface, underground obstructions at the construction site which wold have delayed completion of the building, and therefore installation of the chiller, in any event. GSA was slow in issuing notices and change orders as needed. As a result, it was not until 6 months after

delivery of the chiller that plaintiff was finally requested to and did promptly provide the "start-up" services for the chiller which enable it to "complete the work" called for under its contract.

Meanwhile, defendant had been withholding $23,100 from plaintiff's contract price for what it perceived to be its "refusal or failure to complete the work within the specified time." This withholding was predicated upon a perceived delay in completing the work of 231 days at $100 per day. Liquidated damages were not, however, to be assessed if delay "in the completion of the work arises from unforeseeable causes beyond the control and without the fault or negligence of the contractor." Plaintiff's requests for extensions of time were not acted upon by GSA.

Testimony as to what, if any, actual delay resulted from the late arrival of the chiller is confused and unreliable. Even the GSA witness attributed a maximum of 44 days to that problem. As plaintiff points out in this application for fees and expenses, it would readily have settled this dispute for $4,400 rather than incurring the equivalent of its ultimate recovery, in litigation fees and expenses.

The decision on the merits found that plaintiff's repeated requests for extensions of time based on its problems with Airtemp were not acted upon by GSA. More importantly, there had meanwhile developed far more serious and supervening delays which were in no way attributable to plaintiff and which became the proximate and effective cause of plaintiff's inability to complete its work. Under the

contract, damages were to be assessed only for "failure to complete the work within the specified time," and plaintiff's "work" under the contract consisted not only of purchasing and delivering a chiller to the site, but also of providing "start-up" service for the chiller after it had been installed and connected up by another independent prime contractor. The latter was delayed by unrelated site conditions and problems, with the result that plaintiff was delayed in completing its work of furnishing start-up services following installation by others.

On the basis of the foregoing, it was concluded that plaintiff was entitled to an extension of time sufficient to permit it to complete its work after installation of the chiller by another contractor; that there had been no "refusal or failure to complete the

work within the specified time" when that time is properly extended for reasons beyond the contractor's control and without its fault or negligence; that defendant was not entitled to withhold the sum of $23,100 in liquidated damages from plaintiff's contract price; and that plaintiff was entitled to judgment in that amount.

Discussion

The difficulty with plaintiff's present application for fees and expenses based on the above facts is that most of those facts were not developed until trial and post-trial briefing. Both parties tried the case on the assumption that the only issue involved was plaintiff's responsibility for late delivery by Airtemp of the chiller to the site as if that were the event which completed the work to be performed under plaintiff's contract.

Plaintiff's original request for a time extension was made on that basis. It was only at trial that Government witnesses acknowledged that subsequent events and delays in unrelated areas had removed the delivery of the chiller from the "critical path."[7/] It was only at trial that it appeared that the chiller did not in any event become fully operational until several months after plaintiff had completed its contract by providing "start-up" services on the chiller, and that its prior installation by others had been delayed by other unrelated factors which delayed plaintiff. When the facts are viewed prospectively rather than with the benefit of hindsignt, defendant has sustained its burden of proving that its

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7/ Defined as those items which if delayed, could delay overall completion of the project.

conduct in litigating the issues in this case was substantially justified, and that it was reasonable in litigating the factual and legal issues presented.[8/]

Conclusion

Plaintiff's application for fees and expenses is hereby DENIED.[9/]

8/ See and cf. Gava v. United States, No. 317-78, (Fed. Cir. Feb. 18, 1983); and Kay Mfg. Co. v. United States, No. 478-73 (Fed Cir. Feb. 18, 1983).

9/ The remaining arguments offered by defendant and set forth at the beginning of the opinion are rendered moot by this decision on the "substantially justified' issue.

(iv) The Equal Access to Justice Act.

§2412. Costs and Fees.

(a) Except as otherwise specifically provided by statute, a judgment for costs, as enumerated in section 1920 of this title, but not including the fees and expenses of attorneys, may be awarded to the prevailing party in any civil action brought by or against the United States or any agency and any official of the United States acting in his or her official capacity in any court having jurisdiction of such action. A judgment for costs when taxed against the United States shall, in an amount established by statute, court rule, or order, be limited to reimbursing in whole or in part the prevailing party for the costs incurred by such party in the litigation.

(b) Unless expressly prohibited by statute, a court may award reasonable fees and expenses of attorneys, in addition to the costs

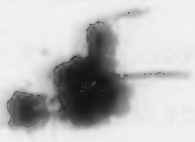
which may be awarded pursuant to subsection (1), to the prevailing party in any civil action brought by or against the United States or any agency and any offical of the United States acting in his or her official capacity in any court having jurisdiction of such action. The United States shall be liable for such fees and expenses to the same extent that any other party would be liable under the common law or under the terms of any statute which specifically provides for such an award.

(c) (1) Any judgment against the United States or any agency and any official of the United States acting in his or her official capacity for costs pursuant to subsection (a) shall be paid as provided in sections 2414 and 2517 of this title and shall be in addition to any relief provided in the judgment.

(2) Any judgment against the United States or any agency and any official of the

United States acting in his or her official capacity for fees and expenses of attorneys pursuant to subsection (b) shall be paid as provided in sections 2414 and 2517 of this title, except that if the basis for the award is a finding that the United States acted in bad faith, then the award shall be paid by any agency found to have acted in bad faith and shall be in addition to any relief provided in the judgment.

(d) (1) (A) Except as otherwise specifically provided by statute, a court shall award to a prevailing party other than the United States fees and other expenses, in addition to any costs awarded pursuant to subsection (a), incurred by that party in any civil action (other than cases sounding in tort) brought by or against the United States in any court having jurisdiction of that action, unless the court finds that the



position of the United States was substantially justified or that special circumstances make an award unjust.

(B) A party seeking an award of fees and other expenses shall, within thirty days of final judgment in the action, submit to the court an application for fees and other expenses which shows that the party is a prevailing party and is eligible to receive an award under this subsection, and the amount sought, including an itemized statement from any attorney or expert witness representing or appearing in behalf of the party stating the actual time expended and the rate at which fees and other expenses are computed. The party shall also allege that the position of the United States was not substantially justified.

(C) The court, in its discretion, may reduce the amount to be awarded pursuant to this subsection, or deny an award, to the

extent that the prevailing party during the course of the proceedings engaged in conduct which unduly and unreasonably protracted the final resolution of the matter in controversy.

(2) For the purposes of this subsection --

(A) "fees and other expenses" includes the reasonable expenses of expert witnesses, the reasonable cost of any study, analysis, engineering report, test, or project which is found by the court to be necessary for the preparation of the party's case, and reasonable attorney fees (The amount of fees awarded under this subsection shall be based upon prevailing market rates for the kind and quality of the services furnished, except that (i) no expert witness shall be compensated at a rate in excess of the highest rate of compensation for expert witnesses paid by the United States; and (ii) attorney fees shall not be awarded in excess of $75 per hour unless the court determines that an increase in the cost of living or a special factor, such as the limited availability of qualified attorneys for the proceedings involved, justifies a higher fee.);

(B) "party" means (i) an individual whose net worth did not exceed $1,000,000 at the time the civil action was filed, (ii) a sole owner of an unincorporated business, or a partnership, corporation, association, or

organization whose net worth did not exceed $5,000,000 at the time the civil action was filed, except that an organization described in section 501(c)(3) of the Internal Revenue Code of 1954 (26 U.S.C. 501(c)(3) exempt from taxation under section 501(a) of the Code and a cooperative association as defined in section 15(a) of the Agricultural Marketing Act (12 U.S.C. 1141j(a))), may be a party regardless of the net worth of such organization or cooperative association, or (iii) a sole owner of an unincorporated business, or a partnership, corporation, association, or organization, having not more than 500 employees at the time the civil action was filed; and

(C) "United States" includes any agency and any official of the United States acting in his or her official capacity.

(3) In awarding fees and other expenses under this subsection to a prevailing party in any action for judicial review of an adversary adjudication, as defined in subsection (b)(1)(c) of section 504 of title 5, United States Code, or an adversary adjudication subject to the Contract Disputes Act of 1978, the court shall include in that award fees and other expenses to the same extent authorized in subsection (a) of such

section, unless the court finds that during such adversary adjudication the position of the United States was substantially justified, or that special circumstances make an award unjust.

(4) (A) Fees and other expenses awarded under this subsection may be paid by any agency over which the party prevails from any funds made available to the agency, by appropriation or otherwise, for such purpose. If not paid by any agency, the fees and other expenses shall be paid in the same manner as the payment of final judgments is made in accordance with sections 2414 and 2517 of this title.

(B) There is authorized to be appropriated to each agency for each of the fiscal years 1982, 1983, and 1984, such sum as may be necessary to pay fees and other expenses

awarded pursuant to this subsection in such fiscal years.

(5) The Director of the Administrative Office of the United States Courts shall include in the annual report prepared pursuant to section 604 of this title, the amount of fees and other expenses awarded during the preceding fiscal year pursuant to this subsection. The report shall describe the number, nature, and amount of the awards, the claims involved in the controversy, and any other relevant information which may aid the Congress in evaluating the scope and impact of such awards.

(e) The provisions of this section shall not apply to any costs, fees, and other expenses in connection with any proceeding to which section 7430 of the Internal Revenue Code of 1954 applies (determined without regard to subsections (b) and (f) of such section).

Nothing in the preceding sentence shall prevent the awarding under subsection (a) of section 2412 of title 28, United States Code, of costs enumerated in section 1920 of such title (as in effect on October 1, 1981).